IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 02..02..2007

Coram

The Hon'ble Mr. Justice K.CHANDRU

C.R.P.(PD) No. 1076 of 2006

S.Amutha .. Petitioner / Petitioner / Respondent.

vs.

C.Manivanna Bhupathy .. Respondent / Respondent / Petitioner.

Petition filed under Article 227 of the Constitution of India for the reasons as stated therein.

For Petitioner : Mr.K.Thilageswaran

For Respondent : Mr.I.C.Vasudevan

ORDER

This Civil Revision Petition has been filed against the order of dismissal dated 13.4.2006 passed in I.A.No.98 of 2006 in H.M.O.P.No.76 of 2005 on the file of the Principal Sub-Judge, Erode.

2. This is a case of an husband and wife fighting over the matrimonial cause relating to the dissolution of their marriage before the trial Court and have put their child on a burner unmindful of its future consequences. This is not a case where the King Solomon's rule can be applied and ask the child to be cut by a sword to find out the real mother. But in this case, the real father and the mother are fighting and the child is called as a witness to speak about the truth or otherwise of the averments made in the pleadings filed by them before the trial Court. The father has brought the minor son and had put him on the witness stand to speak against his mother and the mother has objected to the same. The trial Court has brushed aside the objection of the mother (the revision petitioner herein) and held that the child witness was competent to speak about the dispute between the wife (petitioner) and the husband (respondent) and taken on record the sworn affidavit filed by the minor. The question raised in this Civil Revision Petition is whether such an action is permissible in law.

3. Now reverting to certain basic facts of the case:

The revision petitioner is the wife and she has filed the present Civil Revision Petition against the order dated 13.4.2006 passed by the

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Sub-Court, Erode, in I.A. No.98 of 2006 in H.M.O.P.No.76 of 2005. The respondent herein is the husband, who had filed a petition under Section 13(1) read with Section 13(1)(a) of the Hindu Marriage Act seeking for a decree of divorce from the revision petitioner / wife. The said petition was taken on file as H.M.O.P.No.76 of 2005. The main ground on which the Original Petition was filed was that the revision petitioner / wife had deserted the respondent / husband and gone to her parents' house on 19.4.2005 without any valid reason. During the subsistence of the marriage, which took place on 15.11.1992, the petitioner and the respondent had two children out of which one was a male child, viz., Aravind, studying fifth standard and the other was a female child, viz., Suganthi, studying third standard on the date of the filing of the petition.

4. The Petitioner / wife filed a detailed counter statement dated 21.9.2005 and refuted the contentions of the petitioner. She also alleged that the respondent was of immoral character and he had an affair with a colleague in his office and on her representation, that lady was transferred to a different place. She also stated that at times, the respondent used to beat her up and that he is preventing the children from talking to her. She wanted the dismissal of the petition and also stated that she will take appropriate custody of the children and decided to file an interim petition for maintenance pending litigation.

5. It is at this stage, when the petitioner gave evidence as P.W.1, he also filed a proof affidavit in January 2006 signed by his son Aravind, who was only 11 years old at that time, and on that affidavit was to be cross-examined, as a witness P.W.2 on the side of the respondent / husband. In that affidavit, the said minor Aravind has stated that he was aware of the petitions pending before the trial Court and that he and his sister were staying with the respondent father and they are maintained by him and their entire education and other expenses are met by the respondent father. He also stated that his mother always used to quarrel in the house and many times, she used to leave for his grandmother's house and abuse the respondent, that she had made attempts to split them from their father and on his own accord, he is staying with his father and it is difficult to stay with his mother. Further, he also volunteered to state that his younger sister is not taken care of by his mother and his father does not have any bad habits and they were maintained by him properly. When the proof affidavit was filed, the petitioner took out an application in I.A. No.98 of 2006 stating that the Principal Sub-Court should reject the proof affidavit of P.W.2 (minor Aravind) and also disallow the respondent from examining her son in the trial. The respondent filed a counter stating that as per Section 118 of the Evidence Act, there is no impediment for examining the child in the Court of law and it is the Court, which will have to find out the mental capability of the minor witnesses giving evidence before them.

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6. The trial Court, after hearing both the parties, passed an order stating that after examining Section 118 of the Evidence Act and also after going through the affidavit filed by P.W.2 minor Aravind where he himself signed and who was also produced before the trial Court and found the mental capability of the child and dismissed the petition after holding that the learned Judge was fully satisfied that the child's evidence can be recorded and he can be examined as witness, since there is no bar for examining a child witness. The learned Judge further held that the child was not under any compulsion to give testimony and accordingly, rejected the objection raised by the petitioner / wife. It is against this order, the present Civil Revision Petition has been filed.

7. I have heard the arguments of Mr.K.Thilageswaran, learned counsel appearing for the revision petitioner / wife and Mr.I.C.Vasudevan, learned counsel appearing for the respondent / husband and have perused the records.

8. Since the present petition raises a very important question, it is necessary to refer to several decisions, which will have bearing on the said issue. After the amendment of the Code of Civil Procedure, it becomes essential for the parties to file a proof affidavit under Order 18 Rules 4(1) and(2) of the Code of Civil Procedure, which reads as follows:

O.18 R.4 "Recording of evidence.-- (1) In every case, the examination - in - chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (Cross-examination and re-examination) of the witness in attendance, whose evidence (examination - in - chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it.

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit."

9. When this matter was challenged before the Supreme Court in its decision reported in (2003) 1 SCC 49 [Salem Advocates' Bar Association, T.N. vs. Union of India], the Court in paragraph 17 of the judgment held as follows:

"Para 17 : ..... Reading the provisions of Order 16 and Rule 18 together, it appears to us that Order 18 Rule 4 (1) will necessarily apply to a case contemplated by

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Order 16 Rule 1-A ie., where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit."

[Emphasis added]

10. Subsequently, when the very same case came up for consideration, the Supreme Court held that the cross-examination of a witness, whose proof affidavit filed, should be done only in the Court and not before a Commissioner and no inadmissible document can be read into evidence merely on account such document given Exhibit number in the affidavit. This decision is reported in (2005) 6 SCC 344 [Salem Advocates' Bar Association, T.N. vs. Union of India] and paragraph 5 of the judgment is usefully extracted below:

"Para 5 : The amendment provides that in every case, the examination-in-chief of a witness shall be on affidavit. The Court has already been vested with the power to permit affidavits to be filed as evidence as provided in Order 19 Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open Court has not been disturbed by Order 18 Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-Chief to be on affidavit or cross examination before a Commissioner. The scope of Order 18 Rule 4 has been examined and its validity upheld in Salem Advocate Bar Assn., case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of the examination- in- chief to be recorded in Court."

[Emphasis added]

11. It, therefore, follows that after the introduction of the amendment to Order 18 Rule 4 CPC, a witness will have to give an affidavit and the said affidavit is more or less referable to the Oaths Act and the person, who is signing the affidavit, has to swear to the affidavit and when the question of competency of a person swearing to an affidavit came before the Supreme Court, the Court in its decision reported in AIR 1952 SC 54 [Rameshwar Kalyan Singh vs. The State of Rajasthan], observed in paragraph 7 of the judgment as follows:

"Para 7: The proviso quoted above must be read along with S. 118, Evidence Act and S. 13, Oaths Act. In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not

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his competency. The question of competency is dealt with in S. 118. Every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact unless the Court considers otherwise. No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that S. 118 must prevail."

[Emphasis added]

12. A similar question was further considered by the Supreme Court in its decision reported in 1984 (Supp.) SCC 571 [M.Veerabhadra Rao vs. Tek Chand] and in paragraph 17 of the judgment, the Court observed as follows:

"Para 17: The expression 'affidavit' has been commonly understood to mean a sworn statement in writing made especially under oath or on affirmation before an authorised Magistrate or officer. Affidavit has been defined in sub-cl. (3) of S. 3 of the General Clauses Act, 1897 to include 'affirmation and declaration in the case of person by law allowed to affirm or declare instead of swearing.' The essential ingredients of an affidavit are that the statements or declarations are made by the deponent relevant to the subject matter and in order to add sanctity to it, he swears or affirms the truth of the statements made in the presence of a person who in law is authorised either to administer oath or to accept the affirmation. The responsibility for making precise and accurate statements in affidavit were emphasised by this Court in Krishan Chander Nayar v. Chairman, Central Tractor Organisation. The part or the role assigned to the person entitled to administer oath is no less sancrosanct.

[Emphasis added]

13. As per Section 4 of the Oaths Act, oaths or affirmations have to be made by the persons, who are all witness to be lawfully examined before any Court. Section 5 states that instead of making oath, an affirmation can be made by a witness. As has been held, signing of an affidavit requires an affirmation. The competency of a person to sign an affirmative statement especially when the person is a child, the same cannot be permitted since the child cannot be said to be a competent person to sign an affirmation. In fact, Section 3(3) of the General Clause Act defines an affidavit, which reads as follows:

"affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing"

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14. However, Section 118 of the Evidence Act prescribes the qualification of a person, who can testify before the Court and it reads as under:

> "118. Who may testify.-- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

15. The Courts have made some reconciliation between taking oath before a Court and facing the consequences of breaching the same on the one hand and on the other hand, the competency of giving testimony before the Court. In the interest of justice, Courts have held that a child witness is competent to give evidence though it may not be permissible to administer oath before giving such evidence. It is, in this context, there are several rulings of the Supreme Court as to competency of a child witness and necessary precautions to be taken in sifting evidence given by such a child witness. A reference to these decisions is relevant before we embark upon the admissibility or desirability of a child witness in a proceedings before the Court dealing with a matrimonial cause.

16. In the decision reported in (1998) 7 SCC 177 [Panchhi and others vs. State of U.P.] in paragraphs 11 and 12, the Supreme Court observed as follows:

> "Para 11 : ..... But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.
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> Para 12: Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide, Prakash v. State of Madhya Pradesh, (1992) 4 SCC 225 : (AIR 1993 SC 65); Baby Kandayanathil v. State of Kerala, 1993 Suppl (3) SCC 667 : (1993 AIR SCW 2192); Raja Ram Yadav v. State of Bihar, AIR 1996 SC 1613 : (1996 AIR SCW 1882) and Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341."
>
> [Emphasis added]

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17. Further, in the decision reported in 1995 (Supp) 4 SCC 416 [Arbind Singh vs. State of Bihar], in paragraph 3 of the judgment, the Supreme Court observed as follows:

> "Para 3 : ..... It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring....."

18. It was also seen that by the Supreme Court reported in (1997) 5 SCC 341 [Dattu Ramrao Sakhare and others vs. State of Maharashtra], it was held as follows and the relevant passage found in paragraph 5 is reproduced.

> "Para 5 : ..... In other words even in the absence of oath the evidence of a child witness can be considered under S. 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored....."[Emphasis added]

19. Further, in the decision reported in (2004) 1 SCC 64 [Ratansinh Dalsukhbhai Nayak vs. State of Gujarat], the Supreme Court held in paragraph 7 as follows:

> "Para 7 : ..... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness." [Emphasis added]

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20. In (2003) 3 SCC 21 [Bhagwan Singh and others vs. State of M.P.], the Supreme Court also observed as follows:

> "Para 19: The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony."
>
> [Emphasis added]

21. A perusal of the decisions of the Supreme Court cited above clearly shows that a child is incapable of being administered oath or affirmation as he is only a minor. Yet, in the light of Section 118 of the Evidence Act, child witnesses are not debarred from giving evidence. At the same time, the Courts have put certain restrictions in accepting the evidence of child witnesses especially on the question of corroboration and he may be biased being under the control of the interested persons and the Court must avoid any traces of tutoring or likelihood of tutoring.

22. In fact, in various decisions dealing with the child custody matters, the Courts have taken note of preference of a child being ascertained by Courts. Section 17(3) of the Guardians and Wards Act states that if a minor is old enough to form an intelligent preference, the Court may consider that preference. The Hindu Minority and Guardianship Act, 1956 makes it statutorily mandatory that in declaration of a person as a guardian of a Hindu minor by the Court, the welfare of the minor shall be the paramount consideration. In this context, the Courts have also taken into account the opinion of the minor before passing an order.

23. In this context, it is necessary to refer to the decision of the Supreme Court reported in JT 2006 (10) SC 516 [Lekha vs. P.Anil Kumar] where the Supreme Court while dealing with the custody of the child, held in paragraphs 21 to 23 as follows:

> "Para 21: However, in the present case, we have to decide in the interest of the child as to who would be in a better position to look after the child's welfare and interest. The general view that the Courts have taken is that the interest and welfare of the child is paramount. While it is no doubt true that under the Hindu Law, the father is the natural guardian of a minor after the age of six years, the Court while considering the grant of custody of the minor to him has to take into account other factors as well, such as the capacity of the father to look after the child's needs and to arrange for his upbringing. It also has to be seen whether in view of

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his other commitments, the father is in any position to give personal attention to the child's over-all development.

Para 22: As indicated hereinbefore, we have spoken to the child who, in our view, is intelligent and appears to be capable of expressing his preference. In fact, he has in no uncertain terms indicated his desire to stay with his mother. His mother's second marriage, instead of proving to be a disadvantage, has proved to be beneficial for the child who seems to be happy and contented in his present situation and we do not think it would be right to unsettle the same.

Para 23: The High Court committed a grave error in not ascertaining the wishes of the minor, which has consistently been held by the Courts to be of relevance in deciding grant of custody of minor children. ..."

[Emphasis added]

Therefore, it may be necessary in certain cases to ascertain the views of the minor before decision is rendered in the matter of custody.

24. The Courts have also struck a note of caution in directly examining a child witness before conducting preliminary examination as can be seen from the following rulings.

25. In the decision reported 1996 (1) CRI.L.J. 803 [Jibhau Vishnu Wagh vs. State of Maharashtra], it was held in paragraph 15 of the judgment as follows:

"Para 15: ..... He firstly urged that the prosecutrix was a young girl aged about 8 years and the learned trial Judge should have conducted her preliminary examination in order to ascertain in the level of understanding and only thereafter should have proceeded to record her statement. There can be no dispute that it would have been certainly better for the learned Judge to have first conducted a preliminary examination of the prosecutrix by putting some questions to her and on the basis of answers given by her in reply to them satisfied himself whether she was possessed of sufficient understanding. However, the failure to hold a preliminary examination of a child witness does not introduce a fatal infirmity in the evidence....."

[Emphasis added]

26. In paragraph 6 of the decision reported in 1999 (3) CRI.L.J.2712 [Dhani alias Dhaneswar Naik vs. The State], it has been held as under:

"Para 6 : P.W.4 undoubtedly is a child of ten years at the time his examination was made. So far as acceptability of evidence of P.W.4 is concerned, undisputedly he was a minor boy at the time of alleged

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commission of offence and while deposing in Court. Under Section 118 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') all persons are competent to testify unless the Court considers that because of tender years, extreme old age, discase whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by Section 118 under which competency of witnesses is the rule and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age-limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, i.e. to exclude a witness on the ground of mental or moral capacity, the existence of the incapacity must be made to appear. Under Section 118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto....."

27. In the decision reported in AIR 1963 ORISSA 144 [The State and others vs. Dukhi Dei and others], the Orissa High Court observed in paragraph 8 of the judgment as follows:

"Para 8: The question therefore is whether the evidence of P.W.2 as an eye-witness is reliable for conviction of the appellants. No doubt the evidence of a child witness is to be taken with great caution. Normally evidence of Child witnesses should not be accepted as it is notoriously dangerous unless immediately available and unless narrated before any possibility of coaching is eliminated; there should be closer scrutiny of the evidence of child witnesses before the same is accepted by a court of law."

[Emphasis added]

28. In fact, the Supreme Court in its decision reported in (2004) 5 SCC 518 [Sakshi vs. Union of India and others] has taken extra precaution in examining child witnesses before various forums especially in a criminal forum and it dealt with at length the desirability of recording certain statements in an atmosphere conducive for such recording and paragraphs 27, 28 and 34 of the judgment are usefully extracted below:

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"Para 27: The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in Court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect :

(i) permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person).

(ii) allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

Para 28: The Law Commission, in its response, did not accept the said request in view of Section 273, Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice , cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused."

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Para 34: The writ petition is accordingly disposed of with the following directions.

(1) The provisions of sub-section (2) of S. 327, Cr. P.C. shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Ss. 354 and 377, I.P.C.

(2) In holding trial of child sex abuse or rape :

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.

29. The Rules prescribed under the Tamil Nadu Juvenile Justice Court and Protection of Children Rules 2001 also deals with examination of a child. Relevant Rule 11 is as follows:

(a) As soon as a child is produced before the Juvenile Justice Board, the child shall be enquired on a one to one basis, to enable the child to participate in a proceedings which relates to him.

(b) The atmosphere of the Juvenile Justice Board shall be child-friendly. There shall be no raised dias, witness boxes etc., and the proceedings of the Board shall be like a conference in which the Juvenile Justice Board members, the child, Probation Officer, the Police Officer, the parents, the legal representative etc., shall sit informally and participate in the proceedings.

(c) The wall shall also be fitted with pictures, natural scenarios etc., to create a child friendly atmosphere to develop a positive approach.

30. A Division Bench of this Court in granting directions on a suo motu writ petition with reference to the examination of child witnesses made an order in W.P.No.36807 of 2006 dated 31.10.2006 [The Director, Tamil Nadu State Judicial Academy, Chennai vs. State of Tamil Nadu and others] and gave the following directions to the trial Courts:-

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"While holding the trial of a child sex abuse or rape cases, the courts should ensure that

i. A screen or some such arrangements are made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused.

ii. The victims of child abuse or rape cases, while giving testimony in Court, should be allowed sufficient breaks as and when required.

iii. The questions put in cross -examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court, who may put them to the victim or witnesses in a language which is clear and is not embarrassing to her."

31. Therefore, after the journey into various binding decisions, the following legal prepositions emerge:-

(i) There is no disqualification for a child witness;

(ii) The Court must conduct a preliminary enquiry before allowing a child witness to be examined;

(iii) The Court must be satisfied about the mental capability of a child before giving evidence;

(iv) While sifting the evidence, the possibility of a bias or the child being tutored should be taken note of;

(v) The evidence of a child witness should be corroborated;

(vi) The child cannot be administered oath or affirmation and it is incompetent to do so;

(vii) The Court cannot allow a minor to make an affirmation;
[This will create difficulties for a child as in the Civil Courts in all the proceedings Order 18 Rule 4 CPC will have to be followed making it mandatory to file proof affidavits before cross examination]

(viii) The preference shown by a child is an important factor in child custody matters;

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(ix) A child giving testimony in various fora is entitled to an extra care and special arrangements. In other words, a child friendly atmosphere must be created in Courts.

32. If these yardsticks are applied, the proof affidavit filed by the minor Aravind (P.W.2) should be eschewed as he is incompetent to swear to an affidavit and cannot affirm the statements found in the affidavit received by the trial Court. Therefore, the trial Court was wrong in accepting the proof affidavit from the minor child. From a reading of the order of the trial Court under revision, it is clear that the trial Court has misdirected itself by stating the fact that the affidavit signed by the minor child, is a point in favour. On the other hand, such an affidavit is incompetent and inadmissible in evidence in the light of the Oaths Act read with the General Clauses Act.

33. Further, the trial Court failed to see that when a child is incompetent to sign an affidavit and has also been in the custody of the respondent / husband for over one year before the date of filing the affidavit, it would likely to have been influenced by the respondent / husband and it would not have been an independent person in deposing before the Court. The fact that the affidavit filed by the minor Aravind contains more details than what has been found in the original petition filed by the respondent / husband clearly shows that the child was completely swayed by the father's influence. The fact that the child has spoken about the incidents over which it may not have any direct knowledge will clearly show that the said child witness was clearly tutored. In fact, the affidavit itself clearly shows that he was aware of the fact that his father was filing divorce application and using language, which are mainly legal in nature, is not expected of a child. The fact of ascertaining the mental capability of the child (which was 11 years old) at the time of examination by the trial Judge, cannot take the case of the respondent any further.

34. The present case is not one of custody petition or where the prosecution is trying to establish a crime against the child or a child witness being indispensable in dealing with a detection of a crime. It is a pure case of matrimonial discord of the husband with his wife and the husband having approached the Court on the ground of desertion for relief. For the child throughout his life, requires both the father and mother and in a dispute of this nature, he can never take any side which in the long run, may not be in the interest of the child, which the Courts often emphasize as being paramount importance in dealing with an issue of this nature.

35. Ultimately, neither the father nor the mother can claim suzerainty over the child and in the ultimate analysis, the children are not the children of their parents. The said situation has been beautifully portrayed by Kahlil Gibran on The Prophet [Rupa & Co : 17th

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Edition : 2006], in the following words taken from his poem:

"Your children are not your children.

They are the sons and daughters of Life's longing for itself.

They come through you but not from you,

And though they are with you yet they belong not to you.

You may give them your love but not your thoughts,

For they have their own thoughts.

You may house their bodies but not their souls,

For their souls dwell in the house of tomorrow,

which you cannot visit, not even in your dreams.

You may strive to be like them, but seek not to make them like you.

For life goes not backward nor tarries with yesterday.

You are the bows from which your children as living arrows are sent forth.

Let your bending in the Archer's hand be for gladness;"

36. As rightly portrayed, the bows are the parents and the children are the living arrows, which are sent forth by them and the bending in the archer's hand should be only for gladness and not for misery as in the present case, where the husband wants to use the child against his mother.

37. Under the above circumstances, it is clear that the order dated 13.4.2006 passed by the learned trial Judge in I.A. No.98 of 2006 in H.M.O.P.No.76 of 2005 is illegal and it is hereby set aside. The affidavit signed by P.W.2 minor Aravind cannot be taken on file and should be removed and in the facts and circumstances of the case, the child cannot be a witness in a matrimonial dispute of this nature and the trial Court is barred from examining the minor Aravind as P.W.2. The trial Court is hereby directed to deal with the matter eschewing the proof affidavit of P.W.2 minor Aravind and further restrain from

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examining the child and proceed to decide the matter in accordance with law. However, there will be no order as to costs. Consequently, connected M.P. No.1 of 2006 will stand dismissed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

gri

To

The Principal Sub Judge
Erode

+ 1 CC To Mr.E.C.Vasudevan, Advocate SR NO.6562

C.R.P.(PD) No. 1076 of 2006

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